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Plaintiffs and Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants and Appellees,

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Defendants/Intervenors and Appellees/Cross-Appellants.

SUPPLEMENTAL BRIEF OF SOUTHERN MONTANA AND THE URQUHARTS RE MOOTNESS ARISING OUT OF THE 2009 COUNTY-WIDE REZONING AND NEW ZONING REGULATIONS AND ZONING MAP ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

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I. INTRODUCTION

The Board of Cascade County Commissioners embarked on a lengthy, publicly noticed process to adopt a new, county-wide zoning map and zoning regulations. The public record establishes that the process started in the spring of 2008. The process included the mailing of questionnaires to rural residents, publicly noticed meetings and hearings, posting of the proposed draft regulations and draft zoning map at public places and on the County's website and, ultimately, the adoption of a new county-wide zoning map.

The Board of County Commissioners, acting in their legislative capacity to enact local governing regulations, are granted great deference by the courts with respect to their decisions. The great deference is proper since the courts should allow local governing bodies to decide and determine local governing issues. As Professor Zeigler instructs, a comprehensive rezoning is "...universally considered a legislative act entitled to broad judicial deference." Edward H. Zeigler, Jr., ***The Law of Zoning and Planning,*** 38:14.

The county-wide rezoning process, which spanned approximately 18 months from the spring of 2008 until the final resolution was adopted August 25, 2009 was a proper exercise of the legislative powers of the Board

of County Commissioners and presents a second ground of mootness upon which this Court should, under the authority of its own decisions, dismiss the appeal of Plains Grains, et al.

II. BACKGROUND

The Agenda Action Report, dated July 14, 2009 (attached hereto as Appendix 1), provides a good summary of the process of the county-wide rezoning initiated in the spring of 2008. The Agenda Action Report reviews the public notices and postings as well as the posting of the draft regulations on the Cascade County website (www.co.cascade.mt.us) and verifies that the rezoning was undertaken on a county-wide basis.

It was not undertaken to scuttle the appeal by Plains Grains, et al. The time and effort invested in the county wide rezoning effort was so enormous that it would exceed credibility for Plains Grains, et. al., to argue that this large undertaking was motivated by a desire on the part of the Cascade County Commissioners to misuse the zoning process for the sole purpose of ending this appeal. The county-wide process was clearly undertaken to rezone the entire County. The study, public process and adoption of a new county wide zoning map were a proper exercise of the legislative function of the Board.

The Resolution of Intention, which is attached to the Action Agenda Report, (Appendix 1) reflects that the legislature authorized the Board of County Commissioners to amend zoning regulations. The Report also reflects that legal notices were published in the *Great Falls Tribune* on ***EIGHT*** separate occasions prior to a public hearing on April 21, 2009 before the Cascade County Planning Board.

The public record reflects that the process was proper, was not motivated for any improper purpose (an issue which is not before this Court) and reflects a desire to improve county-wide zoning in rural areas and in areas around the rural communities scattered throughout Cascade County. The record developed for the Urquhart rezoning request, which included a voluminous environmental impact study, established that this site, because of its proximity to necessary infrastructure and ability to connect to the transmission grid was the best site for a generating plant. A prior study by Montana Power Company in the late 1980s came to the same conclusion. Power plants cannot be located out in "the middle of nowhere"--- if there is such a thing as "the middle of nowhere"--- because they need proximity to the transmission grid, water, sewer, gas and other utilities. At the same time, a power generating plant should not be located in the heart of a densely populated area. The rezoning by Cascade County achieved a proper balance.

At oral argument, counsel for Appellants made a dramatic appeal to the Court to stop what he described as a "coal plant", which he said would require condemnation proceedings for a rail line, would cause delisting of the historic landmark of the path of Lewis & Clark on their journey around the Great Falls of the Missouri and implored the Court to protect his clients whom he described as small farmers. The record before the Court, however, reflects that the proposed electric generating plant is to be a natural gas plant that will not require condemnation for a rail line for coal delivery and will serve approximately 50,000 rural Montanans who are not served by the for profit energy companies. These owners/customers of the rural cooperatives include *tens of thousands of farmers and ranchers* whose electric needs were not served by for profit energy companies and whose power from the Bonneville Power Administration and the Western Area Power Administration is being reduced and will be eliminated in a few short years. The interests of thousands of Montanans, stretching from Great Falls to Miles City, for a stable, dependable source of electricity for homes, schools, businesses, farm irrigation, and hospitals are recognized by the courts as taking precedence over objections by adjacent neighbors.[1] ***The Law of Zoning and Planning,*** 41:5.

[1] There are only seven residences within three miles of the site, including the Urquharts' residences.

Rural electric cooperatives were formed in order to extend electric service to rural areas. The Congress of the United States enacted the Rural Electrification Act in 1936 for the purpose of providing electric power to rural communities of America. Congress recognized that private companies operating electrical generation facilities had failed to extend electric service to rural areas. As a result of the Rural Electrification Act, rural communities formed non-profit electric distribution cooperatives. The distribution cooperatives later formed upper tier generation and transmission cooperatives to supply electricity and transmission services to the distribution cooperatives. In turn, the distribution cooperatives sell power to the individual customer who is also a member of the distribution cooperative. This system was necessitated by the reluctance of for-profit electric companies to serve rural areas with many miles between customers. Southern Montana is a rural cooperative that seeks to own its own generation facility to serve rural Montanans.

Since the deregulation and split up of Montana Power Company, Montanans no longer own their generation or transmission facilities. This would be the first new project that would be Montanan owned and that would provide power to rural Montanans. The project is a natural gas fueled plant that has received from the Montana Department of Environmental

Quality, in final form, its air quality permit. The gas plant will not require condemnation for a rail line and will be located approximately one half mile from the landmark. The landmark is on private property and has been built upon throughout Great Falls – most recently by the construction of Great Falls Central Catholic High School and its gymnasium. A considerable portion of Great Falls either lies on or within one-half mile of the path of Lewis and Clark.

Appellants would raise to the level of conspiracy or secrecy the county-side rezoning, however, the public record reflects eight public notices of the hearing in the *Great Falls Tribune* on May 24, May 31, June 7, June 14, June 21, June 28, July 5 and July 12, 2009, the mailing of 1,335 questionnaires to rural residents in the spring and summer of 2008 and the posting of the proposed regulations.

III. THE DECISIONS OF THIS COURT ON MOOTNESS ARE CURRENT, CLEAR AND CONTROLLING.

The string of recent decisions on the issue of mootness is controlling of the outcome of both mootness issues now before the Court. All litigants before the Court are entitled to rely upon prior rulings. While the Court is not bound to follow a "manifestly wrong decision" it is a fundamental principle to promote the Court's desire for stability, predictability and equal treatment. ***Allstate Insurance Co. v. Wagner-Ellsworth,*** 2000MT 240, ¶ 27,

344 Mont. 445, 188 P.3d 1042, 1048-1050 (Mont. 2008).

There has been no case cited to this Court by our opponents that distinguishes the consistent holdings of this Court in the mootness cases or their application to the mootness issues before this Court in this case. Southern Montana was entitled under the law to proceed to purchase the property and commence construction once the County Commission approved the Urquharts' application to rezone the property. The purchase of the property and commencement of construction (an investment of approximately $40 Million dollars to date) was not an underhanded attempt by a developer to take advantage of a loophole. Southern's intention to purchase the property and proceed with construction was public and in fact, under the air quality permit, a public document, the Montana Department of Environmental Quality imposed a strict deadline for commencement of construction. The Appellants clearly and certainly knew of the plans, the deadline to commence construction and the procedure for obtaining a stay.

The opponents filed multiple appeals and challenges but have never sought a stay or injunction. Under the mootness doctrine and the recent decisions from this Court warning litigants of the need to move for a stay, they did so at their peril. ***See e.g. Henesh v. Bd. of Commrs. of Gallatin County***, 2007 MT 335, 340 Mont. 239, 173 P.3d 1188; ***Povsha v. City of***

Billings, 2007 MT 353, 340 Mont. 346, 174 P.3d 515; and ***City of Whitefish v. Bd. of County Commrs. of Flathead County,*** 2008 MT 436, 347 Mont. 490, 199 P.3d 201; While the failure to seek a stay may be a litigation tactic to attempt to avoid responsibility for delay damages, as this Court recognized in ***Swan Lakers v. Bd. of County Commrs. of Lake County*** (Mont. Sup. Ct. Cause No. DA 07-0619 Order of June 11, 2008, attached as Appendix 2), a bond is required to stay a project and a developer is entitled to the protection of a bond. It is contrary to basic notions of due process and equal protection to imply or express that a developer should not proceed with a permitted project when the opponents have failed to move for a stay on multiple occasions.

IV. THE OUTCOME OF THIS ISSUE IS CONTROLLED BY THIS COURT'S RECENT DECISION IN *COUNTRY HIGHLANDS HOMEOWNERS ASSOCIATION V. BOARD OF COUNTY COMMISSIONERS*

Just as the first mootness issue relative to the Urquhart rezoning application (the sale of the property and commencement of project development) is controlled by recent decisions from the Supreme Court, this mootness issue is likewise controlled by a recent decision from this Court. The factually identical situation arose in ***Country Highlands Homeowners Association, Inc. v. Board of County Commissioners of Flathead County***, 2008 MT 286, 345 Mont. 379, 191 P.3d 424. In ***Country Highlands***,

Flathead County had an existing 1987 Growth Policy in place when it granted a zoning amendment for land contiguous to property owned by Country Highlands Homeowners Association. Country Highlands then appealed the zoning amendment to the district court. The district court upheld the grant of the rezoning amendment. Country Highlands Homeowners Association appealed to the Supreme Court and during the pendency of that appeal, Flathead County went through a county-wide rezoning or adoption of a new "growth policy" just as was done by Cascade County.

> While this case was pending on appeal, Flathead County adopted a new growth policy (2007 Growth Policy). This policy replaced the 1987 Growth Policy. The 2007 Growth Policy reenacted the zoning at issue here by incorporating the existing zoning districts, providing: "Land use zoning in existence at the time the Growth Policy is adopted shall remain in place." *Flathead County Growth Policy*, Res. No. 2015A, (Mont.) Ch. 9, p. 139 (Mar. 19, 2007).

Country Highlands, ¶13.

The Board of County Commissioners raised the issue of mootness. Since mootness is a threshold issue, the Supreme Court addressed mootness before deciding whether the earlier zoning amendment of the property adjacent to the Country Highlands' property was invalid under the prior Growth Policy.

The Board of County Commissioners argued that the appeal by Country Highlands was moot because the earlier zoning regulations (Growth Policy) had been "repealed and replaced by the 2007 Growth Policy." ***Country Highlands***, ¶20. This Court agreed that the appeal was moot because even if it held that the prior rezoning amendment was invalid under the earlier growth policy, the ... "2007 Growth Policy reenacted the 2005 zoning district amendment via incorporation and that action is presumed lawful and valid absent another challenge." ***Country Highlands***, ¶22.

The ***Country Highlands*** case is controlling. The issue before this Court is mootness. The issue of whether the 2009 county-wide rezoning by Cascade County was valid is not before the Court.

The Appellants, as did all residents of Cascade County, had notice of the process, the public hearings and the proposed county-wide rezoning and failed to challenge it. There is no record before this Court upon which to now base a challenge. The sole issue to be determined, with respect to the county-wide rezoning, is whether it renders moot the grant of the rezoning request of the Urquharts. The county wide rezoning of 2009 ***absolutely*** renders this case moot.

An analogous issue was recently decided by this Court in ***Marr v. Fairview Commercial Lending, Inc.***, (DA 09-0323, Order dated September

23, 2009, copy attached as Appendix 3). Appellant Sheri Marr defaulted on her mortgage and a trustee's sale was set. Marr filed a Complaint requesting injunctive relief. An initial temporary restraining order was issued but an extension was denied. The property was sold to a related entity, Fairview Holdings, Inc. Fairview Commercial Lending filed a Motion to Dismiss the appeal with this Court on the basis that the sale of the property rendered the appeal moot. Appellant Sheri Marr opposed dismissal, arguing that the sale by Fairview Commercial Lending, Inc. to Fairview Holding, Inc. was fraudulent and voidable. Marr asked this Court to allow the district court to address her claim that the sale was a fraudulent conveyance. As this Court noted, the fraudulent conveyance issue was not before the Court. The Supreme Court also noted that Marr did not move the district court for a stay of judgment pending appeal. As a result, the Supreme Court ***dismissed the appeal as moot*** in its Order of September 23, 2009 (Appendix 3).

The Appellants and their supporting organizations have litigated against the proposed project in many forums without seeking a stay or injunction:

- There were multiple appeals of the initial air quality permit for a coal fired generating plant. Appellant MEIC appealed the air permit to the Board of Environmental Review and appealed

another portion of the air permit proceeding to the district court.

- Appellant MEIC and the Sierra Club filed suit in federal district court in Washington, D.C. to challenge funding of the plant by the Rural Utility Service.
- Appellant MEIC sued the City of Great Falls in state district court seeking review of proprietary business records of Southern Montana.
- Appellant MEIC and the landowners filed appeals with the Cascade County Planning Board over the issuance of the location conformance permit (the County building permit).
- Appellant MEIC, Citizens for Clean Energy and Sierra Club and others sued the Department of Environmental Quality in state district court challenging construction of the Highwood Generating Plant.

This Court, in its Order of April 28, 2009 (copy attached as Appendix 4), in response to the Petition for Writ of Supervisory Control, set out in detail the procedure for obtaining a stay or an injunction. In several prior rulings on the issue of mootness, this Court has warned litigants of the danger of not seeking a stay. *See*: e.g., ***City of Whitefish v. Board of***

Flathead County, 2008 MT 436, 347 Mont. 490, 199 P.3d 201, in which this Court noted that it "...chided the applicants in both ***Povsha*** and ***Henesh*** for failing to appeal the district court's denial of the request for injunctive relief or for failing to seek a stay of proceedings until the parties could reach a resolution on the merits..." ***City of Whitefish***, ¶ 23. Now, with respect to the county-wide rezoning process, despite eight public notices and a lengthy process, no appeal or stay or injunction of the county-wide rezoning was sought by Appellant MEIC or any of the other Plaintiffs. The Resolution has been through the public hearing process and has been finally adopted by the Board in its legislative role.

The multiple appeals and suits, without ***ever*** requesting a stay or injunction is a conscious litigation plan designed to delay and stop projects without posting any security or bond for the protection of a developer. The developer is lawfully entitled to go forward with construction in the absence of a stay or injunction. Filing multiple suits and appeals without requesting a stay and posting a bond to protect against damages can be used as an abusive tactic to stop lawful development. Permits often contain deadlines for commencement and the developer, like Southern Montana, must proceed or forfeit the permit. Southern Montana had a deadline imposed by the State of Montana, Department of Environmental Quality. It is indeed absurd to argue

impliedly or expressly that Southern Montana should have waited the outcome of these multiple appeals and suits.

Certainly, the statutory procedures for seeking a stay or injunction are, in part, for the protection of the developer. Yet the litigation tactic of filing multiple appeals without posting a bond can be improperly used to kill a project by frustrating financing and other necessary contractual arrangements for the development. The failure to seek a stay of the county-wide rezoning, which was publicly noticed on ***eight*** separate occasions, is another example of the failure of Plains Grains and MEIC, et. al., to follow the multiple warnings of this Court.

This Court cannot address the propriety of the county-wide rezoning process because that issue is not before the Court. Likewise, this is not a case that would fall within the exception to the mootness doctrine noted in ***Country Highlands***, *supra*, based upon ***Montana – Dakota Utilities Company v. City of Billings***, 2003 MT 332, 318 Mont. 407, 80 P.3d 1247. The Court, in ***Country Highlands***, *supra* did not apply the exception because the county wide rezoning did not present the problem or potential of reenactment of an illegal tax by the City of Billings or other cities which were in search of more revenue as this Court found in ***City of Billings,*** *supra.*

> Given the inclination of Montana's local government leaders to exploit new sources of revenue, we anticipate the question of whether the Montana Legislature has checked the power of local governments to charge franchise fees will, in the absence of appellate review, arise again....We conclude that appellate review of the franchise fee controversy will have the effect of a final judgment in law regarding the rights of local governments and utilities and is appropriate at this time.

City of Billings, ¶10.

Since it is clear and beyond dispute that every county commission has the power to conduct a county wide rezone, there is no need for further appellate review to make that determination---it is not a matter in dispute. Further, there is a review process in place for county wide rezoning and the 2009 Cascade County rezoning was not challenged. Therefore, the rezoning process is not before this Court and there is no basis to find an exception to the mootness doctrine.

V. CONCLUSION

This appeal is also subject to dismissal for mootness on the basis of the 2009 county-wide rezoning process which was just completed. As this Court recently ruled in ***Country Highlands Homeowners Association***, *supra*, the county-wide rezoning or adoption of a new Growth Policy renders the issue of the prior grant of the Urquharts' zoning request moot.

This appeal is also moot because of the failure of the Appellants to seek a stay or injunction of the prior zoning amendment granted to the Urquharts who subsequently sold the property to Southern Montana and Southern Montana proceeded with construction which it was lawfully entitled to do. Southern Montana, of course, is entitled to lawfully proceed and has the same due process and equal protection rights of all Montanans to conduct a lawful business. All protestants and opponents of rezoning have been warned on multiple occasions by this Court of the danger and risk of mootness by failing to seek a stay or injunction. Multiple litigation and appeals without a stay should not be allowed to stay and eventually kill a project.

Southern Montana alternatively requests that this Court affirm the district court's decision. The rezoning did not constitute illegal spot zoning because the area is large, the intended use was not significantly different than the uses allowed in the original zoning designation of A-2 and the benefits of the rezoning extend far beyond a single landowner.

DATED this 17th day of December, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 5,000 words, excluding certificate of service and certificate of compliance.

DATED this 17th day of December, 2009.

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I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

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APPENDIX TO SUPPLEMENTAL BRIEF

(Attached to Appellees/Cross-Appellants Supplemental Brief)

Agenda Action Report..... Tab 1

Swan Lakers v. Bd. Of County Commrs. of Lake County,
(Mont. Sup. Ct. Cause No. DA 07-0619)..... Tab 2

Order, issued on September 23, 2009, in ***Marr v. Fairview Commercial Lending, Inc.*** (Mont. Sup. Ct. Cause No. DA 09-0323).....Tab 3

Order, issued on April 28, 2009, in ***Plains Grains Limited Partnership v. Montana Eighth Jud. Dist. Ct.*** (Mont. Sup. Ct. Cause No. OP 09-0054)..... ...Tab 4